

IN THE DISTRICT COURT OF THE NINTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR BONNEVILLE COUNTY.

Filed
Aug. 29, 1922

F. L. KOON,

PLAINTIFF,

-vs-

JOHN EMPEY, Watermaster
of District No. 36,
O. H. OLIVE, C. H. DECAMP,
and the HARRISON CANAL
COMPANY, a corporation

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND DECREE.

Defendants.

This cause having been called regularly for trial before the Court, such trial having been held at the Court room in Idaho Falls, Idaho, on the 27th day of January, 1922, O. A. Johannesen appeared as attorney for the defendants. And the Court having heard the proof of the respective parties and considered the same, and the records and papers in the cause, and the arguments of the respective attorneys thereon, such arguments having been submitted by written brief of the respective attorneys, and the cause having been submitted to the Court for its decision,

THE COURT NOW FINDS THE FOLLOWING FACTS:

1.

That on or about the 20th day of December, 1905, the defendant O. H. Olive, whose full name is Oliver H. Olive, executed a certain Warranty Deed bearing date of that day by which said Warranty Deed, the said-named defendant conveyed to the plaintiff, F. L. Koon, whose full name is Frank L. Koon, the following described real property, situated in what was then known as Fremont County, State of Idaho, and described as follows, to-wit:

The East half of the Northwest quarter ($E\frac{1}{2}$ -NW $\frac{1}{4}$) and lots one and two (1-2) of Section eighteen (18), in Township five (5) North, Range thirty-nine (39) East Boise Meridian, containing, according to the Government Survey, 160 acres.

Together with the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining,

which said Deed was thereafter duly recorded in the Records of said Fremont County, in Book "R" of Deeds, at page 222, and

which said deed has been admitted as plaintiff's exhibit "A" in this cause; that the said F. L. Koon has been at all times from and after the said 20th day of December, 1905, and now is, in the open and exclusive possession of the said described premises, and that during the entire period of his ownership and possession, he has paid the taxes that have been levied against the said property.

11.

That on or about the 20th day of December, 1905, the defendant O. H. Olive, whose full name is Oliver H. Olive, executed a certain Warranty Deed bearing date of that day by which said Warranty Deed, the said-named defendant conveyed to one Hyland C. Graves, the following described real property, situated in what was then known as Fremont County, State of Idaho, and described as follows, to-wit:

The South half of the Southwest quarter ($S\frac{1}{2}$ -SW $\frac{1}{4}$) of Section seventeen, (17); the North half of the Southeast quarter ($N\frac{1}{2}$ -SE $\frac{1}{4}$) and the Southeast quarter of the Southeast quarter (SE $\frac{1}{4}$ *SE $\frac{1}{4}$), and lot five (5), Section eighteen (18); the Northeast quarter of the Northwest quarter (NE $\frac{1}{4}$ -NW $\frac{1}{4}$) and lot two (2) of section twenty (20), all being in Township five (5) North, Range thirty-nine (39) East Boise Meridian, and containing, according to the Government Survey, 320 acres, more or less.

Together with the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining.

which said Deed was thereafter duly recorded in the Records of said Fremont County, in Book "R" of Deeds, at page 223, and which said Deed has been admitted as plaintiff's exhibit "B" in this cause; that by a series of mesne conveyances the said described premises had passed into the possession and ownership of the said plaintiff, and that for a period of more than five years last past, the said plaintiff has been in open and exclusive possession of the said described premises, and that during the entire period of his ownership and possession, he has paid the taxes that have been levied against the said property.

111.

That on the said 20th day of December, 1905, there had become appurtenant to the lands described in the preceding paragraphs, which said lands are now owned by the plaintiff, 600 miners inches of water, claimed from the South Fork of Snake River, and what is known as the "Bannock Jim Slough", and which said water is required in the irrigation of the said described premises, and was at the date of the said conveyances the property of the defendant O. H. Olive; that on or about the 16th day of December, 1910, in the case of the Rexburg Irrigation Co, et al., plaintiffs, vs. Teton Irrigation Canal Co. et al. defendants, a Decree was made by the District Court of the Sixth Judicial District of the State of Idaho, wherein the aforesaid 600 miners inches of water, with a priority date of June 1st, 1889, was decreed for use upon the premises herein-before described, being the premises now owned by the plaintiff.

IV.

That by the terms of the said two Deeds referred to and described in paragraphs I and II of these Findings, the said 600 miners inches of water, having a priority date of June 1st, 1889, and by the said decree decreed to O. H. Olive for use upon the said land herein-before described, and which said lands, passed from the said O. H. Olive, one of the defendants herein, to the

grantees in the aforesaid Decrees, to-wit, the plaintiff F. L. Koon, and the plaintiff's predecessor, Hyland C. Graves, and that the title to the said 600 miners inches of water have, by the said conveyances and the mesne conveyances from the said Hyland C. Graves, passed to the plaintiff F. L. Koon, and that title to the said water is now in the said plaintiff, F. L. Koon.

V.

That the defendant John Empey is the watermaster of water district No. 36, of the State of Idaho, and that said-named defendant has no interest or equity whatsoever in and to the said water right herein-before described, and that the only interest of said defendant in said water is that of an official watermaster having charge of the distribution of the waters of Snake River or waters tributary to said river in the said District No. 36.

That the defendant C. H. DeCamp is an alleged grantee of the defendant O. H. Olive, and claims some right, title or interest in and to the said 600 miners inches of water, by reason of an alleged conveyance, made sometime subsequent to the 9th day of December, 1918; that the alleged claim, title or interest of the said defendant C. H. DeCamp, in and to the said 600 miners inches of water, was and is dependant upon the defendant O. H. Olive, having an interest or having title in and to the said described water; that the defendant C. H. DeCamp has no right, title or interest whatsoever in and to the herein-before described 600 miners inches of water;

That the defendant the Harrison Canal Co. is an Idaho corporation, and that the said-named defendant corporation is an alleged transferee of the defendants O. H. Olive and C. H. DeCamp, of the said 600 miners inches of water, by reason of an alleged certificate of transfer made by the State Engineer of Idaho, on or about the 9th day of December, 1918, and another certificate made by the Commissioner of Reclamation of the said State on or about the 8th day of May, 1919; that the rights, interests and claims of the said defendant Harrison Canal Co., a corporation, has no right, title or interest whatsoever in and to the waters herein-before described, being the aforesaid 600 miners inches of water claimed by the plaintiff.

VI.

That the lands herein-before described, and which said lands are now owned by the plaintiff, and are situated in what is now known as Madison County, State of Idaho, are arid in character and require water by means of irrigation in order to produce crops thereon; that for many years prior to December 20, 1905, and at all times subsequent to said date, crops have annually been grown on the said lands by means of irrigation; that the plaintiff maintains at the present time, a system of irrigation which is adequate to irrigate the lands herein-before described, so as to produce crops on said lands; that the water for the irrigation of said lands is diverted from what is commonly known as the "Bannock Jim Slough"; that the said lands will not grow crops unless they are irrigated.

VII.

That all the allegations and averments of the plaintiff's complaint are true, and have been fully supported by the evidence, and that all the denials and allegations of the defendants' answer are untrue.

VIII.

That the said lands herein-before described are situated within the boundaries of water district No. 36 of the State of Idaho; that the court has jurisdiction in said cause.

CONCLUSIONS OF LAW.

AS CONCLUSIONS OF LAW FROM THE FOREGOING FACTS,
THE COURT NOW HEREBY FINDS AND DECIDES:

I.

That the 600 miners inches of water from Snake River by way of the Bannock Jim Slough, decreed to O. H. Olive, with a priority date of June 1, 1889, for use upon the lands herein-before described, being the lands now owned by the plaintiff, were appurtenant to the aforesaid lands, and that title thereto passed from the defendant O. H. Olive, in the conveyance dated December 20, 1905, and recorded in Book "R" of Deeds, at pages 222 and 223, Records of Fremont County, State of Idaho, and herein-before described.

II.

That as between the plaintiff and the defendants, the plaintiff is the holder of the legal title to the aforesaid 600 miners inches of water, and is entitled to the possession of the same as against the said defendants, all and severally, and all persons claiming or to claim the same, or any part thereof, under them, the said defendants, or either of them, and that neither one of the said defendants has any right, title or interest in and to the said aforesaid 600 miners inches of water, or any part thereof.

III.

That the plaintiff is entitled to a decree of this court as prayed for in his complaint, enjoining the said defendants, and each and all of them, and all persons claiming or to claim the same, or any part thereof, under or through the said defendants, or either of them, from diverting or permitting to be diverted, except as ordered by the plaintiff, the said 600 miners inches of water herein-before described.

IV.

That the plaintiff is entitled to a judgment for costs to be taxed herein against only the defendants O. H. Olive and C. H. DeCamp.

DECREE.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

I.

That the plaintiff have judgment as prayed for in his complaint.

II.

That as between the plaintiff and defendants and each and all of them, the plaintiff is the legal and lawful owner, and entitled to the possession and use of that certain water right consisting of 600 miners inches of water of Snake River, decreed to O. H. Olive, with a priority date of June 1st, 1889, in that certain decree made and entered in the District Court of the Sixth Judicial District of the State of Idaho, in the case of the Rexburg Irrigation Co. et al., plaintiffs, vs. Teton Irrig. Canal Co. et al. defendants, and which said decree is dated December 16, 1919;

That the said described water right was conveyed by proper Warranty Deeds, by the defendant O. H. Olive, as an appurtenance to and as forming a part of the following described real property, now owned by the plaintiff F. L. Koon, and situated in Madison County, State of Idaho, and more particularly described as follows, to-wit:

The East half of the Northwest quarter ($E\frac{1}{2}$ -NW $\frac{1}{4}$) and lots one and two (1-2) of Section eighteen (18) in Township five (5) North, Range thirty-nine (39) East Boise Meridian, containing, according to the Government survey, 160 acres.

The South half of the Southwest quarter ($S\frac{1}{2}$ -SW $\frac{1}{4}$) of Section seventeen (17); the North half of the Southeast quarter ($N\frac{1}{2}$ -SE $\frac{1}{4}$) and the Southeast quarter of the Southeast quarter ($SE\frac{1}{4}$ -SE $\frac{1}{4}$), and Lot five, (5), Section eighteen (18); the Northeast quarter of the Northwest quarter (NE $\frac{1}{4}$ -NW $\frac{1}{4}$) and Lot two (2) of Section twenty (20), all being in Township five (5) North, Range thirty-nine (39) East Boise Meridian, and containing, according to the Government survey, 320 acres, more or less.

III.

That the defendant John Empey, watermaster of water district No. 36 of the State of Idaho, his agents and employees and his successor or successors in office, and all agents and employees having to do with the distribution of the waters of Snake River in district No. 36, be and they are hereby perpetually enjoined and restrained from diverting or permitting to be diverted, the aforesaid 600 miners inches of water, except as may be ordered by the said plaintiff, to the full intent and purpose that the aforesaid and described water shall be permitted to flow and be used in the same manner as they did and were prior to the diversion complained of, unless otherwise ordered by the plaintiff or his successors.

IV.

That the defendants O. H. Olive, C. H. DeCamp and the Harrison Canal Co. a corporation, each and all of them, as well as all and any person or persons claiming by, through, or under the said-names defendants, or any one of them, have no right, title, interest or equity in and to the aforesaid 600 miners inches of water, or any part or portion thereof, and that they be, and they are hereby perpetually enjoined and restrained from diverting and using, or diverting or using, or causing to be diverted and used, or causing to be diverted or used, the said 600 miners inches of water, herein-before more particularly and fully described, or any part thereof, and also from in any manner interfering with the regular flow and use of the said waters, as the same flowed and were used prior to the diversion complained of by the plaintiff; that the said-named defendants, each and all of them be, and they are hereby perpetually en-

joined and restrained from in any manner or in any wise doing, or causing to be done, any act or thing which shall in any manner becloud or otherwise cause plaintiff's title to the aforesaid 600 miners inches of water to be questioned.

V.

That the plaintiff have judgment against the defendants O. H. Olive and C. H. DeCamp for his costs herein.

Dated this 10th day of August, 1922.

O. R. Baum,

Judge who tried said cause.

IN THE DISTRICT COURT OF THE NINTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF BONNEVILLE

Independent Irrigation Company,
Limited, et al.

Plaintiffs,

vs.

Long Island Irrigation Company,
W. G. Swendsen, Commissioner of
Reclamation of the State of Idaho,
and John Empey, Watermaster,
Water District No. 36, State of
Idaho.

Defendants.

O R D E R

On motion of Otto E. McCutcheon, attorney for John Empey, Watermaster, Water District No. 36 of the State of Idaho, after argument by the said McCutcheon, opposed by the argument of O. A. Johannesen, attorney for the plaintiffs, and the matter being fully considered by the court:

It appearing to the court that the judgment heretofore rendered and entered on October 9th, 1922 in the above entitled action and appearing of record in book 12 of Judgments at page 547 records of Jefferson County, Idaho, is void as to the defendants W. G. Swendsen, Commissioner of Reclamation of the State of Idaho, and John Empey, Watermaster of Water District No. 36 of the State of Idaho;

It is ordered, adjudged and decreed, as to said defendants W. G. Swendsen, Commissioner of Reclamation of the State of Idaho, and John Empey, Watermaster of Water District No. 36 of the State of Idaho, that the said judgment dated October 9th, 1922, and appearing of record in book 12 of Judgments at page 547, records of Jefferson County, Idaho, be and the same is hereby vacated, annulled and held for naught, and the defaults of said defendants heretofore entered in said cause be and they are hereby vacated and set aside.

Dated December 16th, 1922

JAMES G. GWINN

Receipt of copy of the foregoing
order is hereby admitted this 16th
day of December, 1922.

O. A. JOHANNESSEN
Attorney for the Plaintiffs.

IN THE DISTRICT COURT OF THE NINTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEFFERSON

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INDEPENDENT IRRIGATION COMPANY, Limited,
a corporation, J. E. Schofield, O. W. Green,
B. R. Shippen, E. M. Staker, George Berrett,
C. S. Owens, Gus Youngstrum, George Polson,
William Cherry, J. G. Andrews, C. A. Hansen,
J. W. Bone, William S. Berrett, R. K. Liver-
more, George Cherry, G. M. Green, Alma Nielsen,
O. C. Raymond, Joe Hadley, R. D. Green, and
A. S. Anderson

PLAINTIFFS,

vs.

LONG ISLAND IRRIGATION COMPANY, a corporation,
JOHN EMPEY, Watermaster of District Number 36,
and W. G. SWENDSEN, Commissioner of Reclamation
of the State of Idaho,

DEFENDANTS.

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
ORDER AND DECREE.

This cause came on to be heard this 9th day of October, 1922,
O. A. Johannesen, Esq., appearing for and on behalf of the plaintiffs, and
the said defendants not appearing either in person or by counsel, and
witnesses having been duly sworn, to testify for and on behalf of the plaintiff,
and the court having heard the evidence, and being fully informed as to the
law in the matter, finds as follows:

FINDINGS OF FACT.

I.

That on or about the 21st day of March, 1922, the plaintiffs filed
a complaint against the above named defendants, and also filed a Lis Pendens,
as provided by law; that an order was issued by this Court directing the
publication of the said Lis Pendens in the Rigby Star, a newspaper published
in Jefferson County, Idaho; that copy of the said Lis Pendens was duly published
in the said Rigby Star for a period of three (3) consecutive weeks, and that
proof of said publication has been duly filed herein.

II.

That each and all of the defendants have duly been served with Summons
in manner as provided by law, and that the Default of each and all of said
defendants, for failure to answer to plaintiffs' complaint, has been duly
entered.

III.

That on or about the 5th day of July, 1922, this Court made an order restraining the defendant, John Empey, Watermaster of water district number 36, from interfering with the water supply of the plaintiffs, and directing the said named defendant to appear before this Court, at Rigby, Idaho, on the 2nd day of October, 1922, at ten o'clock A. M. and show cause why a permanent injunction should not be issued, enjoining the said defendant from shutting off the water supply of the said plaintiffs, and from denying them the right to use the water claimed by them, and more fully described in the Complaint on file herein; that the said defendant John Empey, water master as aforesaid, failed to appear before this Court, at the time and place as in said Order directed, and that the Default of the said-named defendant has been duly entered herein, for failure to so appear and show cause.

IV.

That some time prior to the year 1884, the plaintiffs herein, and their predecessors in interest, appropriated certain waters arising and flowing in what is known as Scott Slough, a natural channel extending in an Easterly and Westerly direction on what was formerly known as Poole's Island, said Slough being in Township five (5) North, and ranges 37, 38 and 39, East Boise Meridian; that the said waters so appropriated in said Slough were diverted therefrom by means of certain dams and headgates constructed on said Slough, at a point near the center of Section Twenty-six (26), Township five (5) North, Range thirty-eight (38) East Boise Meridian, and conducted therefrom through and by means of a natural slough to a point on such natural channel, at or near the North boundary line of Section twenty-eight (28) Township five (5) North, Range thirty-eight (38) East Boise Meridian, at which point another dam and headgate was constructed, and the water flowing therein diverted into a channel constructed from said point and extending in a westerly direction on and to the lands owned by the plaintiffs and irrigated from said system.

V.

That the waters herein referred to are natural waters that arise in the said Scott Slough, and in the natural channel from said Slough, which has been used by the plaintiffs and their predecessors as a part of their canal system, such waters flowing into the said channels from natural springs, and other natural sources; that the said described waters have, from a date prior to June 1st, 1884, been diverted from the said channels on and to the lands of the plaintiffs, and have been used in a beneficial way by the said plaintiffs and their predecessors, for domestic and irrigation purposes, and that said waters are now so used by the plaintiffs herein.

VI.

That the plaintiff Independent Irrigation Company, Limited, was duly incorporated under the laws of the State of Idaho, on or about the 19th day of March, 1904, and that from and ever after said date, the said corporation has continued as such, and now is a corporation existing under and by virtue of the laws of the State of Idaho; that prior to the said incorporation of said plaintiff Company, the said Company existed as a partnership, composed of the other plaintiffs, or their predecessors in interest, and that the said corporation existed as such a co-operative association on the 1st day of June, 1884; that the said named plaintiff corporation is the owner of that certain irrigation system commonly known as the Independent Canal, the said Canal having its diversion dam on what is known as Scott Slough, at a point at or near the center of Section twenty-six (26), Township five (5) North, Range thirty-eight (38) East Boise Meridian, and which said irrigation system diverts the water of said Scott Slough

VII.

That the stockholders of the plaintiff the Independent Irrigation Company, Limited, are the following persons, to-wit:

J. C. Schofield	J. E. Andrew
O. W. Green	C. A. Hansen
B. R. Shippen	J. W. Bone
E. M. Staker	William S. Berrett
George Berrett	R. K. Livermore
C. S. Owens	George Cherry
Gus Youngstrum	G. M. Green
George Pelson	Alma Nielsen
William Cherry	O. C. Raymond
J. G. Andrew	Joe Hadley
H. E. Olaveson	A. S. Anderson
J. W. Hart	R. D. Green,

that the said named stockholders own and farm a total of twenty-two hundred (2200) acres of farming land situated under the aforesaid canal system, and irrigated therefrom, which said lands are situated in Sections 18, 19, 20, 21, 28, 29 and 30, in Township 5 North, Range 38, East Boise Meridian, and in Section 25, Township 5 North, Range 37, East Boise Meridian, all being in Jefferson County, State of Idaho.

VIII.

That the said named plaintiffs have appropriated, used in a beneficial manner, and claimed, under a claim of ownership, from and everafter the 1st day of June, 1884, forty-four (44) cubic second feet of water arising from natural sources, and flowing in the said Scott Slough and the said natural channel diverting therefrom and used as part of the irrigation system of the said plaintiffs; that the use of the said 44 cubic second feet of water aforesaid has been used and claimed by the said plaintiffs under a claim of absolute ownership, and such use and diversion has been open and notorious, and has been adverse to the rights of each and all of the defendants, as well as to the rights and claims of any and all persons whomsoever, and adverse to all the world.

IX.

That the said 44 cubic second feet of water aforesaid, is necessary in the irrigation of the lands of the plaintiffs, and to their full enjoyment; that crops cannot be grown upon the said lands, except through means of irrigation, and by means of the use of water herein described and claimed by the plaintiffs.

X.

That each and all of the allegations contained in plaintiffs' complaint are true and fully supported by the testimony of the witnesses who have testified in said action.

CONCLUSIONS OF LAW

I.

The Court finds that the plaintiffs are entitled to the Decree of this Court, decreeing to the said plaintiffs, for use upon their several lands, forty-four (44) cubic second feet of natural water, arising and flowing in what is known as Scott Slough, and in the natural channel extending therefrom, and used by the plaintiffs as part of their irrigation system, with a priority date of such diversion and use dating from June 1st, 1884; and that the defendants, and the successors in office to the defendants W. G. Swendsen, Commissioner of Reclamation, and John Empey, water master of water district number 36, be perpetually enjoined from in any manner interfering with the said water so claimed by the plaintiffs, and herein decreed to them, or from in any manner preventing the said plaintiffs from the free and unobstructed diversion and use of said waters.

DECREE.

WHEREFORE, By reason of the law and facts aforesaid, IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS, to-wit:

I.

That each and all of the tracts of land owned by the plaintiffs, and situated in Sections 18, 19, 20, 21, 28, 29 and 30, Township 5 North, Range 38, East Boise Meridian, and in Section 25, Township 5 North, Range 37 East Boise Meridian, and comprising twenty-two hundred (2200) acres, more or less, of farming land, and which are tributary to the canal system maintained by the said plaintiffs and known as the Independent Canal, are arid in character, and require the artificial application of water to render them valuable for agricultural purposes.

II.

That the plaintiffs have been diverting and using, under the claim of ownership, from and ever after the 1st day of June, 1884, and now are so diverting, using and claiming forty-four (44) cubic second feet of natural water arising and flowing in what is known as Scott Slough, and also in that certain other natural channel extending from the said Scott Slough, at a point on the South bank of said Slough, at or near the center of Section 26, Township 5 North, Range 38, East Boise Meridian, and which said forty-four (44) cubic second feet of water have been continuously used by the said plaintiffs in the irrigation of their lands situated and described as herein set out; that the plaintiffs, or their successors in interest, have a right to the free use and enjoyment, and they are hereby awarded the free use and enjoyment, of the said forty-four (44) cubic second feet of water, for their said respective lands, and that the said use and claim dates from the 1st day of June, 1884; that the said named plaintiffs have the right, and they are hereby awarded the right, to the use of the aforesaid water, for irrigation and other purposes.

III.

enjoined and restrained from any and all interference with the diversion or use of the waters of the said Scott Slough, and the said natural channel extending therefrom and used by the plaintiffs as a part of their irrigation system, to the amount of the said forty-four (44) cubic second feet of water, whenever such interference, diversion or use would in any manner interfere with the said quantity of water awarded by this decree to the plaintiffs herein, or their successors in interest.

IV.

That this Decree is supplemental to, and in addition to that certain decree entered in the Sixth Judicial District of the State of Idaho, in and for Fremont County, on or about the 16th day of December, 1910, in that certain cause wherein the Rexburg Irrigation Company, et al., were the plaintiffs, and Teton Irrigation Canal Company, et al, were the defendants, and that the water herein awarded to the use of the plaintiffs is in addition to any water awarded in the said last named decree.

V.

That the lands in which the said forty-four (44) cubic second feet of water have been used, comprise twenty-two hundred (2200) acres, more or less of land, owned by the plaintiffs herein and lying under and being tributary to the canal system owned by the plaintiff Independent Irrigation Company, Limited, and which said lands are situated in Sections 18, 19, 20, 21, 28, 29 and 30, Township 5 North, Range 38, East Boise Meridian, and in Section 25, Township 5 North, Range 37, East Boise Meridian; that the said forty-four (44) cubic second feet of water is hereby declared appurtenant to said lands.

Done in open Court this 9th day of October, 1922.

JAMES G. GWINN

District Judge.